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June 24, 2005

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, Massachusetts 02110

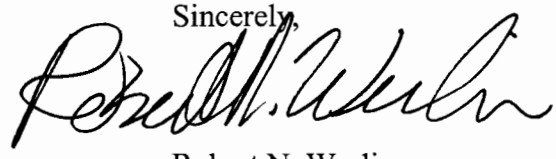
Re: D.T.E. 04-113, Boston Edison Company – NSTAR Reply Comments

Dear Secretary Cottrell:

Enclosed for filing are the Reply Comments of Boston Edison Company d/b/a NSTAR Electric, which respond to the June 22, 2005 comments filed by the Massachusetts Water Resources Authority.

Thank you for your attention to this matter.

Sincerely,



Robert N. Werlin

cc: Shaela McNulty Collins, Hearing Officer
Service List

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company	)	D.T.E. 04-113

REPLY COMMENTS OF BOSTON EDISON COMPANY D/B/A NSTAR ELECTRIC

I. INTRODUCTION

Boston Edison Company d/b/a NSTAR Electric ("Boston Edison" or the "Company") hereby responds to the comments submitted by the Massachusetts Water Resources Authority (the "MWRA") relating to replacement pages for the Rate WR tariff filed by the Company on May 18, 2005. As described below, those pages were properly filed to comport with a settlement agreement (the "Settlement Agreement") among Boston Edison, the MWRA and the Attorney General, as approved on May 31, 2002, by the Department of Telecommunications and Energy (the "Department"). Boston Edison Company, D.T.E. 01-108-A (2002). The Settlement Agreement provides for the phase-in, between 2002 and 2011, of increases in the level of the transition cost charges to be paid by the MWRA under Boston Edison Rate WR, until the rate equals the transition cost charged to all other retail rate classes. Id.

The facts regarding the submission of the replacement pages for the tariff are not in dispute. Pursuant to the Department-approved Settlement Agreement, the formula used to calculate the phased in increase applicable to the MWRA for years 2002 through 2004 was to change beginning in 2005. The Company's December 7, 2004 filing

inadvertently continued to reflect the provisions of the Settlement Agreement applicable to the years 2002 to 2004. The Company filed replacement pages to its December 7, 2004 filing on May 18, 2005, which the MWRA states "are consistent with the provisions of the Settlement Agreement" (MWRA Comments at 2). Despite this acknowledgment, the MWRA requests that the Department reject the tariff changes for effect on January 1, 2005 because of the rule against retroactive ratemaking (MWRA Comments at 2). As described more fully below, the MWRA, as a party to the Department-approved Settlement Agreement, is bound by its terms, which are not avoidable or otherwise barred by the rule against retroactive ratemaking.

II. ARGUMENT

A brief description of the Settlement Agreement is helpful to understand the facts surrounding this case. Rate WR was first established as a separate rate class to serve the MWRA and approved by the Department in Boston Edison Company, D.P.U. 90-288 (1991). After the Electric Industry Restructuring Act, Chapter 164 of the Acts of 1997 (the "Restructuring Act"), the Department directed the Company to unbundle the WR tariff partially. Boston Edison Company, D.P.U./D.T.E. 96-23, at 36-37 (1998). In December 2001, the Company proposed a new Rate WR, which included the uniform transition charge billed to all other retail rate classes. The tariff filing ultimately resulted in the Settlement Agreement, which allowed for the phase-in of the increase in the price level for the transition charge in order to mitigate the adverse bill impacts that would otherwise be experienced by the MWRA. Boston Edison Company, D.T.E. 01-108-A at 8-9 (2002). The Department approved the Settlement Agreement, and noted that the increases to the transition charge to be billed to the MWRA will help to "lower the

amount of the transition costs to be recovered from [Boston Edison's] other retail customers." Id. at 9.[1]

The MWRA, as a party to the Department-approved Settlement Agreement, explicitly agreed to a phase-in of the transition charge that it would pay each year, leading ultimately in 2011 to pay the same uniform transition charge billed to all other retail customer classes. Id. at 4. In light of this explicit Settlement Agreement, the MWRA should not now be permitted to argue that it need not honor the terms of the Settlement Agreement and the Department's order because of retroactive ratemaking.

As described, the MWRA does not object to the "substance of the proposed changes," but argues only that they are prohibited by the rule against retroactive ratemaking (MWRA Comments at 5). The MWRA's argument is without merit and should be rejected by the Department because the doctrine does not apply where the parties enter into preexisting agreements on rates.[2] See Texas Eastern Transmission Corp. v. FERC, 102 F3d 174, at 183-184 (5th Cir. 1996) (filed-rate doctrine normally does not apply where parties enter into preexisting agreements on proposed rates); See also Hall v. FERC, 691 F.2d 1184, 1192 (5th Cir. 1982) (the Commission wrongly applied filed rate doctrine to bar an increase in rates that parties had previously authorized in a contract), *cert denied*, 464 U.S. 822 (1983); City of Piqua v. FERC, 610 F.2d 950, 954-955 (D.C. Cir. 1979) (affirming Commission's refusal to apply filed-rate doctrine

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[1] Of course, if the MWRA is permitted to avoid its agreed-to responsibilities under the Settlement Agreement, the recovery of those costs that should have been collected from the MWRA will be shifted to other customers of Boston Edison.

[2] The MWRA's reliance on New England Telephone, D.P.U. 84-238 (1985) is misplaced. Although the Department did not find controlling the fact that ATTCOM "reportedly agreed" to pay back charges retroactively, the "reported agreement" was never submitted to or approved by the Department in a final order.

because the rate change was prospective from the date of the contract in which the parties agreed to this rate change).

Similarly, the directives and approval provided in the Department order approving the Settlement Agreement establish the ultimate authority for subsequent tariffs and their underlying construction. See Whitensville Water Company, D.P.U. 87-156 (1989), *citing* Boston Consolidated Gas Company v. Department of Public Utilities, 321 Mass. 259, 265 (1947).

> [T]he very object of entering a final order in a proceeding before a public board . . . is to embody and integrate in a single statement the final completed result of all that has gone before. To that final order or decree, and in the absence of genuine ambiguity, to that alone the parties have a right to look to ascertain their rights and duties.[3]

Id. at 15, *citing* Boston Consolidated Gas Company v. Department of Public Utilities, 321 Mass. 259, 265 (1947).

Moreover, the cases cited by the MWRA describing the concept of retroactive ratemaking deal with non-reconciling, base rates. When the Supreme Judicial Court was faced with a non-base rate, it determined that the limitations on retroactive application did not apply to a reconciling rate:

> We have not previously been asked to determine whether the rule against retroactive ratemaking should be applied to adjustments in the CGAC [cost of gas adjustment clause], but we have no difficulty in concluding that an order retroactively adjusting a CGAC is well within the [D]epartment's general supervisory authority over utility costs, see G. L. c. 164, s. 76, and is consistent with its "broad authority to determine ratemaking matters in the public interest." Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 440 Mass. 856, 868 (1997).

[3] Any ambiguity created because of the inconsistency between the requirements of the Settlement Agreement and the non-complying tariff filed on December 7, 2004, must be resolved in favor of the Settlement Agreement. There is no dispute that the Settlement Agreement establishes the method for setting the WR rate and that the tariff pages filed in December did not comply with those requirements.

> [footnote omitted]. Retroactivity is inherent in the very nature of a CGAC. Unlike the base rate, which is a calculation of rates going forward based on historical data, the CGAC adjusts semiannually for utility costs as they actually have been incurred, according to a mechanically applied technical formula. See Consumers Org. for Fair Energy Equality, Inc. v. Department of Pub. Utils., supra at 606. The formula itself is a fixed "rate" that cannot be changed outside the hearing procedure mandated by G. L. c.164, s. 94. See id. at 604. But the "dollars and cents" amount inserted into the flowthrough formula is presumptively not fixed. Id. They represent costs over which utilities often have little bargaining power or control, and it would defeat the very purpose of a CGAC to require these costs to be frozen until the expensive and cumbersome process of a rate change hearing is completed. See id. at 606-607 (it would be "incongruous" to require a s. 94 rate proceeding before passing cost fluctuations onto ratepayers, because "the clauses were designed precisely to avoid those proceedings except where changes were being proposed in the clauses themselves").

Fitchburg Gas and Electric Light Company v. Department of Telecommunications and Energy, 440 Mass. 625 (2004), at 637-638.[4] See also Automobile Insurers Bureau of Massachusetts v. Commissioner of Insurance, 425 Mass. 262, at 268 (1997) ("the annual reconciliation process…requires that the commissioner go back for up to four years"). Similar to the CGAC, the transition charge, which is the subject of this dispute, is a reconciling, non-base rate authorized under G.L. c. 164, §§ 1A, et seq., and not G.L. c. 164, § 94. Accordingly, the cases cited by the MWRA relating to retroactive ratemaking are not applicable to this situation.

The Company's proposed Rate WR was submitted to the Department on December 7, 2004 as part of the Company's annual Transition Charge reconciliation filing. When such annual Transition Charge filings are made, the Department typically allows rates to go into effect on January 1st of the following year, subject to a Department

[4] As the Department noted in the order that was the subject of the Fitchburg appeal, the CGA factor was approved each year, subject to subsequent review. Fitchburg Gas and Electric Light Company, D.T.E. 99-66-A at 26. Boston Edison is unaware that the Department ever conducted a full investigation that would have approved the final reconciliation.

investigation involving a review of all underlying input values and their consistency with Department precedent. It was during this period of the Department's investigation into the filing that the Company learned that its new Rate WR did not comply with the specific requirements of the Settlement Agreement and filed replacement pages. Retroactive ratemaking is not implicated in this case where the Department's Order has not yet become final.

> The rule against retroactive ratemaking is implicated when the Department requires refunds of charges previously fixed by a formal finding that had become final. See Boston Edison Co. v. D.P.U., 375 Mass. 1, 6 (1978), M.D.C., 352 Mass. at 26. The rule, however, has no application to the facts of this case because the Department imposed rates on an interim basis pending the Department's consideration of the remand by the Supreme Judicial Court.

Boston Gas Company, D.T.E. 96-50-D at 8-9 (2001); see also Panhandle Eastern Pipeline Company, 65 FERC ¶ 61,130, at 61,646-61,647 (1993) (where tariffs are allowed to go into effect subject to compliance proceeding, correction of an error in the tariff does not constitute retroactive ratemaking). Accordingly, absent a final order by the Department in this case, the MWRA's argument concerning the application of retroactive ratemaking is off the mark and should be rejected by the Department.

In this case, the MWRA entered into a Settlement Agreement with the Company that was approved in a final order of the Department. Boston Edison Company, D.T.E. 01-108-A (2002). The MWRA does not dispute that the new Rate WR is consistent with the Settlement Agreement. Accordingly, the Department's Order in D.T.E. 01-108-A approving the Settlement Agreement establishes the proper legal authority for the Company's replacement Rate WR. Neither the filed-rate doctrine nor the rule against retroactive ratemaking applies to the facts of this case.

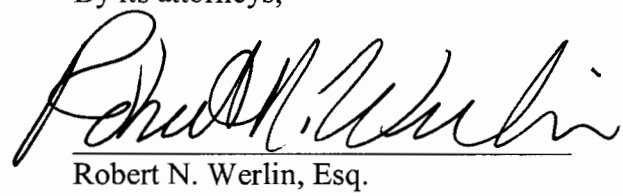
III. CONCLUSION

For all of the reasons described herein, Boston Edison respectfully requests the Department to reject the Comments of the MWRA in this case and approve the Company's proposed replacement pages for M.D.T.E. No. 135C, Rate WR.

Respectfully submitted

BOSTON EDISON COMPANY
D/B/A NSTAR ELECTRIC

By its attorneys,



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Dated: June 24, 2005